

FAIR EMPLOYMENT & HOUSING COMMISSION

455 GOLDEN GATE AVENUE, SUITE 10600
SAN FRANCISCO, CA 94102
(415) 557-2325 FACSIMILE (415) 557-0855
www.fehc.ca.gov



MINUTES 484th COMMISSION MEETING

August 24, 2010
Hiram Johnson State Building
455 Golden Gate Avenue, Santa Barbara Room, Lower Level
San Francisco, California

PRESENT:

Vice-Chair Patricia Perez; Commissioners Dave Carothers, Stuart Leviton and Linda Ng; Commission staff Ann Noel, Joan Herrington, Caroline Hunt and Cynthia Jones and Commission Law Student Extern Mark Rodiles-Peterson; Department of Fair Employment and Housing Chief Counsel Susan Saylor; and members of the public: ex-FEHC extern Chris O'Connell; Karla Davis, California Teachers' Association; Noah Lebowitz, Esq., California Employment Lawyers' Association; and Susan Skamser, ADA Coordinator, Contra Costa County.

OPEN SESSION

Vice-Chair Perez moved, Commissioner Carothers seconded, and the Commission voted 4:0 to open the meeting at 10:15 a.m. [10-24]

REVIEW OF AGENDA

Vice-Chair Perez moved, Commissioner Carothers seconded, and the Commission voted 4:0 to accept the Agenda as submitted. [10-25]

REVIEW OF THE MINUTES

Vice Chair Perez moved, Commissioner Ng seconded, and the Commission unanimously voted to adopt the Minutes and Transactions of the 483rd Commission meeting. [10-26]

MAILOUT

The Commission discussed a staff suggestion to send documents for mailout electronically rather than with paper copies, both to save paper and because of very limited staff resources. The Commission agreed to try an all-electronic mail out on a trial basis for the October 20, 2010 meeting. The Commissioners agreed to an early mailout of November 18 for the December 8, 2010 Commission meeting.

REGULATIONS (10:21 a.m.)

ELAS Noel reported on the current status of the Commission's regulatory projects in the areas of pregnancy, disability and housing. Commissioners are working with staff on each regulatory project.

Pregnancy Regulations: The Commission discussed the new revised draft of pregnancy regulations, modified by the Commission's Pregnancy Regulations Subcommittee, Vice Chair Patti Perez and Commissioner Stuart Leviton, after reviewing all public comments received from its May 8, 2010 regulations.

Commissioner Carothers asked why the Subcommittee had not adopted the California Chambers' comment to eliminate protections for "perceived pregnancy." The Subcommittee members explained that the FEHA protects against perceptions that employees or applicants are member of a protected group, such as race or pregnancy, the same way that FEHA protects someone with that actual characteristic.

The Commission discussed the newly proposed section 7291.14, which states that an employee's right to take a pregnancy disability leave under Government Code section 12945, subdivision (a), and these regulations is separate and distinct from the right to take a leave of absence as a form of reasonable accommodation under Government Code section 12940, subdivision (m). While the Commission as a whole agreed that this new provision provided useful guidance to the public, the Commission unanimously agreed to eliminate the beginning of the second sentence of section 7291.14, as confusing and unnecessary, because an employee could develop a physical or mental disability covered under FEHA at any time. The Commission modified the second sentence as follows: At the end of an employee's ~~four months of~~ pregnancy disability leave, an employee who has developed a physical or mental disability may be entitled to reasonable accommodation under Government Code section 12940, subdivision (m).

The Commission also discussed criticism from several commentators representing employees about the inclusion of an "undue hardship" defense for the reasonable accommodation provisions of Government Code section 12945, despite the lack of explicit language in 12945. Commissioner Leviton noted that while 12945 does not specifically mention "undue hardship," section 12945 does reference both Government Code section 12926 and 12940, where undue hardship is used, so he is comfortable that utilizing undue hardship is an appropriate measure to ascertain what accommodations are considered "reasonable."

Commissioner Leviton moved, Commissioner Carothers seconded, and the Commission voted unanimously to adopt the revised pregnancy regulations, with the one amendment to California Code of Regulations, title 2, section 7291.14, as noted above. [10-27]

ELAS Noel said that staff would send out the new proposed pregnancy regulations for public comment as quickly as possible so that Subcommittee members could review those comments, revise the pregnancy regulations, and present a new draft to be considered and adopted at the

October 20, 2010 Commission meeting. Vice-Chair Perez asked that the pregnancy regulations be proofed to put in quotes consistently every time that “morning sickness” is referenced.

ELAS Noel interrupted her regulations report to allow the Department of Fair Employment and Housing to give its report.

DEPARTMENT’S REPORT (10:47 a.m.)

Chief Counsel Susan Saylor presented the report for the DFEH. The DFEH is closing two regional offices in San Diego and Santa Ana. The DFEH will then have three regional offices in the “Bay Area” (Oakland), “Sacramento” (Elk Grove), and Los Angeles, with three satellite offices connected to these regional offices, respectively, in San Jose, Fresno and Bakersfield. Both Commissioners Leviton and Carothers asked why it made sense to close its two Southern California offices in San Diego and Santa Ana and keep open its Bakersfield office when so much of the state’s population is in Los Angeles and south to the border. Chief Counsel Saylor stated that the Los Angeles office actually is two offices and individual offices are not necessary as the DFEH has moved to an online and telephone intake system, making so many local offices unnecessary.

Chief Counsel Saylor announced that as of August 1, 2010, the DFEH had appointed her to be Chief Counsel and former DFEH Chief Counsel Tim Muscat as Chief of Enforcement.

Chief Counsel Saylor reported about current DFEH litigation. The DFEH’s Special Investigations’ Unit has brought a class action against Verizon for denial of CFRA leave for its employees. There are 10 named plaintiffs in this case which is in Superior Court. The DFEH also has a class action against Penske Logistics, who the DFEH alleges, asked unlawful questions during the interview process. There are 13 named complainants in this matter, which is also in Superior Court.

Chief Counsel Saylor stated that the DFEH has settled a number of cases recently in cases alleging sexual harassment, pregnancy, and denial of reasonable accommodation.

The DFEH has sponsored a FEHA “clean up” bill, SB 1252 (Corbett), which makes technical amendments to the FEHA, which will amend the FEHA to conform the civil penalty caps provided in FEHA housing cases to those currently stated in the federal Fair Housing Amendments Act; (2) make technical revisions to add “source of income” to the list of protected characteristics, which are already in part of the FEHA; and amend Civil Code sections 51.2 and 51.10 and Government Code section 12955 to clarify that admission preferences based on age, imposed in connection with a federally-approved housing program, do not constitute age discrimination in housing. Saylor reported that the bill passed the Assembly floor on August 19, was enrolled on August 23, and is currently at the Governor’s Office.

Commissioner Carothers asked Chief Counsel Saylor what is the DFEH doing to publicize its office closings? Chief Counsel Saylor said that she's not sure, but there's a movement to make all intake of complaints over the telephone.

The Commissioners congratulated Saylor on her appointment as Chief Counsel and thanked her for the DFEH report.

REGULATIONS, cont'd (11:10 a.m.)

Disability Regulations: ELAS Noel stated that staff has completed its Initial Statement of Reasons for the disability regulations and now must complete a Fiscal Impact Statement to be sent to the Department of Finance for its review.

Housing Regulations: The Commission continues to work on its housing regulations.

COMMISSIONERS' REPORTS (11:17 a.m.)

The Commission discussed building more time in the agenda to discuss civil rights items in length, invite the public come to address the Commission and discuss structural changes in the way hearings are conducted and other Commission business. Commissioners Carothers and Leviton asked staff to put on the agenda time to discuss the Commission's procedural regulations regarding hearing length and other ways to streamline litigation.

Commissioner Ng also reported that the Sacramento Minority Business Conference that she's working on she estimates will be held in the early part of next year. Commissioner Ng would like to invite Commissioners and staff to make presentations on FEHA law.

Commissioner Patti Perez discussed that she will be speaking about the Commission's disability regulations at the upcoming Labor and Employment section's annual meeting on October 15, 2010.

EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT (11:21 a.m.)

ELAS Noel reported on the following items:

- 1. Commission Mediations:** ELAS Noel reported that staff now conducts an early mediation evaluation conference for every case set for hearing and aggressively works to settle cases. ELAS Noel thanked Commissioners who have served as mediators and noted that in at least half of the cases, the parties are interested in mediation. Commissioner Leviton questioned whether we should make mediation mandatory.
- 2. Outreach:** Commission staff and Commissioners are increasing their outreach to the public about its various rulemaking projects, principally the FEHC's disability

regulations. There is huge interest in the Commission's disability regulations. Commissioners or staff will speak at the following events: the three employer roundtables – Northern California (September 16), Central California (October 6) and Southern California (November 4). ELAS Noel stated that there is enormous public interest in these disability regulations. Vice Chair Patti Perez will also talk about the disability regulations at the State Bar Labor & Employment Conference on disability (October 15). ELAS Noel is speaking on October 16 to the National Employment Law Association on different kinds of disability leaves. Noel also spoke on June 16, 2010 to the California Association of Equal Rights Professionals on California leave laws (June 16), creating a table comparing different California leave laws which will be posted on the Commission's website.

3. **Educational Items for the Agenda:** Commissioners agreed to talk next meeting about ideas for longer meetings with different topics that we could discuss, e.g., work-life issues, collaboration with the California Commission on the Status of Women, etc.
4. **Ethics:** Judge Caroline Hunt, the Commission's ethics officer, stated that she will be talking to those Commissioners who have yet to complete required ethics training.
5. **Miscellaneous:** ELAS Noel directed the Commissioners' attention to her Activity Report for other items.

ATTORNEY GENERAL'S REPORT (11:43 a.m.)

Deputy Attorney General Kathy Mikkelsen gave the Attorney General's report. Mikkelsen reported that the Civil Rights Enforcement Section is litigating a case on behalf of the Native American Heritage Commission regarding a Native American "sanctified ceremonial burial site" of the Kumeyaay tribe, that is at the location of the Padre Dam.

PUBLIC COMMENTS (11:50 a.m.)

Susan Skamser stated that she will submit comments on the pregnancy regulations. She appreciated clarifications by the Commission on distinctions between pregnancy and other kinds of disabilities. Skamser agrees that pre-pregnancy infertility problems should not be included as a related medical condition. Commissioner Leviton stated that the Commission is not empowered to go beyond what is stated by the Legislature and the Commission felt that infertility, especially including infertility for men, was going beyond the legislative intent of Government Code section 12945.

No other members of the public chose to address the Commission.

Commissioner Leviton moved, Commissioner Ng seconded, and the Commission voted unanimously 4:0 to end Open Session and to enter Closed Session. [10-28]

The Commission took a break at 11:55 a.m.

The Commission entered Closed Session at 12:05 p.m.

CLOSED SESSION (12:15 p.m.)

Only the Commissioners and Commission staff were present. Judge Caroline L. Hunt left the room.

The Commission discussed writs, hearings and litigation and deliberated on pending cases.

Writs and Appeals

ELAS Noel reported on the status of the following cases.

- (1) DFEH v. Terra Linda Farms (Santillan/Rivas)

ELAS Noel reported that Deputy Attorney General Anthony Severin is now handling this case on behalf of the Commission as DAG Nancy Beninati is on maternity leave. Respondent's opening brief is due August 31, 2010.

Administrative Adjudication: Pending Decisions, Hearings Completed

- (1) DFEH v. Avis Budget Group (Reed)

The Commission requested further revisions to this decision.

- (2) DFEH v. Crestwood Chalet, LLC (Brower)

Commissioner Leviton moved, Vice Chair Patti Perez seconded, and the Commission moved 4:0 to adopt the Proposed Decision. [10-29]

Judge Caroline L. Hunt reentered the room.

- (3) Lyddan Law Group (Williams)

The Commission requested further revisions to this decision.

ADJOURNMENT

Commissioner Leviton moved, Commissioner Carothers seconded, and the Commission voted 4:0 to adjourn the meeting. [10-30]

The Commission adjourned its meeting at 1:30 p.m.

Date: August 24, 2010

PATTI PEREZ

Vice Chair

ANN M. NOEL

Executive and Legal Affairs Secretary

**REPORT OF TRANSACTIONS
OF THE 484th COMMISSION MEETING**

**August 24, 2010
San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 10-24 Voted 4:0 to call the meeting to order.
- 10-25 Voted 4:0 to approve the Agenda.
- 10-26 Adopted the Minutes and Transactions of the 483rd Commission meeting.
- 10-27 Voted 4:0 to approve the proposed, revised pregnancy regulations to submit for further public comment.
- 10-28 Voted 4:0 to end Open Session and begin Closed Session.
- 10-29 Voted 4:0 to adopt the Proposed Decision in DFEH v. Crestwood Chalet, LLC (Brower).
- 10-30 Voted 4:0 to adjourn the meeting.

Prepared By

Ann M. Noel
Executive and Legal Affairs Secretary